

89 - 1450

No. _____

Supreme Court, U.S.
FILED

MAR 2 1990

JOSEPH F. SAMPSON, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

NORTHERN TELECOM, INC.,

Petitioner,

vs.

DUDLEY W. TAYLOR, COMMISSIONER
OF REVENUE, STATE OF TENNESSEE, and
W. J. MICHAEL CODY, ATTORNEY GENERAL
AND REPORTER, STATE OF TENNESSEE,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF TENNESSEE**

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QUESTION PRESENTED

Whether due process requires that the state's judiciary review the construction given to a state procedural tax statute by the state's executive branch in cases in which the executive branch's construction of the procedural statute has deprived a citizen of its property?

LIST OF PARTIES AND RULE 29.1 STATEMENT

All parties to the proceedings below are also parties before the Court.

Petitioner's Rule 29.1 list is attached as App. A at A-1.¹

¹ All references to the Appendix to this Petition are denominated "App.," followed by the unique letter assigned to each item.

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Petitioner, Northern Telecom, Inc. ("Northern Telecom"), respectfully prays that a writ of certiorari issue to review the decision of the Tennessee Supreme Court entered in this action on December 4, 1989.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court has not yet been reported and is reprinted as App. B at B-1.

The Davidson County, Tennessee Chancery Court's Memorandum Opinion has not been reported and is reprinted as App. C at C-1.

JURISDICTION

The decision of the Tennessee Supreme Court was entered on December 4, 1989. Northern Telecom invokes the jurisdiction of this Court as set forth in 28 U.S.C. § 1257(a).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

This action primarily involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution. U.S. CONST., Amend. XIV, § 1. That provision establishes that: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." This action also involves 42 U.S.C. § 1983, Tenn. Code Ann. § 20-13-102 and Tenn. Code Ann.

§ 67-1-1802(a)(6). These statutes are reprinted in full in App. D.

STATEMENT OF THE CASE

The facts of this appeal are simple. In 1983, the Tennessee General Assembly passed a statute which limited the authority of the Commissioner of Revenue for the State of Tennessee ("the Commissioner") to grant tax refunds in certain cases. The Commissioner has erroneously interpreted this procedural statute in a manner which deprives Petitioner Northern Telecom, Inc. ("Northern Telecom") of property to which it would otherwise be entitled. The Tennessee courts have held that they lack subject matter jurisdiction to construe this procedural statute. Northern Telecom respectfully submits that the refusal of the Tennessee courts to accept subject matter jurisdiction to review the statute in question violates Northern Telecom's right to due process under the Fourteenth Amendment to the United States Constitution.

The specific facts of this case are taken from Northern Telecom's complaint because the Tennessee courts disposed of this action on a motion by the Commissioner to dismiss Northern Telecom's complaint for lack of subject matter jurisdiction. During the relevant time period involved in this case, taxpayers in the State of Tennessee could resolve state tax disputes in either of two ways: (i) the taxpayer could pay the disputed taxes under protest

and bring a suit for refund of those taxes in the appropriate Chancery Court within six months after such payment, Tenn. Code Ann. §§ 67-1-901, *et seq.*, or (ii) the taxpayer could file an administrative claim with the Department of Revenue for the refund of the disputed taxes, Tenn. Code Ann. § 67-2301.² In the case at bar, Northern Telecom chose the second of these two alternatives.

While Northern Telecom was preparing its Tennessee corporate franchise and excise tax return for the year ending December 31, 1981, the Commissioner was auditing Northern Telecom's Tennessee excise tax returns for the years 1978 through 1980. During the course of this audit and prior to the filing of Northern Telecom's 1981 excise tax return, the Commissioner notified Northern Telecom that it should classify certain interest income as "non-business" income which under Tenn. Code Ann. § 67-4-810(d) must be wholly *allocated* to Tennessee for excise tax purposes. Northern Telecom had treated the interest income as "business income" on its tax returns for 1978-1980 and had *apportioned* the income among all of the states in which Northern Telecom was doing business (including Tennessee) in accordance with Tenn. Code Ann. § 67-4-811. In preparing its Tennessee excise tax return for 1981, Northern Telecom relied upon the Commissioner's advice with respect to the proper classification of these items of income and duly reported this

² This provision was later recodified as Tenn. Code Ann. § 67-1-707(a)(3), was again recodified in 1986 as Tenn. Code Ann. § 67-1-1802(a)(5), and was again recodified in 1988 as Tenn. Code Ann. § 67-1-1802(a)(6). All references to this section of the Tennessee Code Annotated shall hereinafter be cited as Tenn. Code Ann. § 67-1-1802(a)(6).

interest income as "non-business income." It timely filed that return on October 1, 1982. It did not pay the 1981 taxes under protest.

After completing his audit on March 24, 1983, the Commissioner sent Northern Telecom a formal assessment letter stating that Northern Telecom owed additional Tennessee excise tax for the tax years ending December 31, 1978 and December 31, 1980. After receiving this assessment and further reviewing the proper treatment of the interest income in question, Northern Telecom determined that it had properly treated these items of interest income as "business income" on its Tennessee excise tax returns for the years 1978 through 1980. Accordingly, Northern Telecom paid the assessment under protest, and on May 10, 1984 instituted suit in the time and manner provided by Tenn. Code Ann. §§ 67-1-901 *et seq.* for recovery of the taxes. (Davidson County Chancery Court, Docket No. 84-1062-III). At the same time, Northern Telecom also filed a timely administrative claim for refund of the taxes paid for the tax year ended December 31, 1981, pursuant to Tenn. Code Ann. § 67-1-1802(a)(6). Northern Telecom could not file suit to recover the 1981 taxes because it had not paid those taxes under protest.

On June 24, 1985, the Tennessee Supreme Court in *Holiday Inns, Inc. v. Olsen*, 692 S.W.2d 850 (Tenn. 1985), held that the type of interest income involved in Northern Telecom's lawsuit, and in its administrative claim for refund, was indeed business income for Tennessee excise tax purposes, thus resolving this substantive tax issue in Northern Telecom's favor. Accordingly, on June 16, 1987, Northern Telecom and the Commissioner entered into an agreed final order in Northern Telecom's Chancery Court

lawsuit directing a full refund to Northern Telecom for taxes paid under protest as a result of the Commissioner's assessment for the tax years 1978 through 1980.

However, on December 21, 1987, the Commissioner denied Northern Telecom's administrative claim for refund of its 1981 taxes:

"[S]ince the refund was requested and the return was filed prior to the date of the [*Holiday Inns*] decision, June 24, 1985, we cannot approve your Claim for Refund."

In a letter of June 14, 1988, Allan S. Curtis, Director of the Franchise and Excise Tax Division, more fully elaborated the Commissioner's position as being based on the Commissioner's interpretation of Tenn. Code Ann. § 67-1-1802(a)(6):

"We found that there was no overpayment for 1981 based on the decision rendered in the case *Holiday Inns, Inc. vs. Olsen*, 292 S.W.2d 850. This is because the return requesting the refund was filed June 11, 1984 which was before June 25, 1985, the date the case was decided. Section 67-1-1802(a)(5) TCA [presently 67-1-1802(a)(6)] states 'A refund which is authorized solely by a final court adjudication shall not be made to any person who is not either a party to such action or a party to another similar action.' Therefore, since the corporation was not a party to this action, it is not entitled to a refund based on the suit."

(Emphasis added).³

³ It is Northern Telecom's understanding that the Attorney General of Tennessee has advised the Commissioner that Tenn.

(Continued on following page)

Northern Telecom disputes the Commissioner's interpretation of Tenn. Code Ann. § 67-1-1802(a)(6). Even though Northern Telecom's excise taxes for 1981 were not the subject of any actual court proceeding at the time of the *Holiday Inns* decision, Northern Telecom had been a party to "another similar action" by virtue of its refund suit to recover its excise taxes paid for 1978 through 1980. Therefore, Northern Telecom believes that the Commissioner did have the authority to issue Northern Telecom a refund on its administrative claim.

Accordingly, on June 20, 1988, Northern Telecom filed this action seeking a judicial interpretation of Tenn. Code Ann. § 67-1-1802(a)(6) to settle the dispute. Northern Telecom brought its claim pursuant to both Tennessee's Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101 *et seq.* and 42 U.S.C. § 1983. On August 1, 1988, Respondents filed a motion to dismiss on the grounds that Northern Telecom's complaint failed to state a claim upon which relief could be granted and for lack of subject matter jurisdiction.

On February 10, 1989, the Chancery Court of Davidson County, Tennessee granted Respondents' motion to dismiss. According to the Court, Petitioner failed to follow the procedure set forth for the recovery of taxes under Tenn. Code Ann. §§ 67-1-901, *et seq.*, which is the statute setting forth the procedure by which the taxpayer can pay the taxes in question under protest and bring a suit for refund within six months of such payment. The

(Continued from previous page)

Code Ann. § 67-1-1802(a)(6) should be construed in the manner described above to prohibit refund claims authorized by a final court adjudication unless the taxes in question were the subject of an actual court proceeding at the time of the final court adjudication.

Court also held that Tennessee's doctrine of sovereign immunity, as codified at Tenn. Code Ann, § 20-13-102, barred Petitioner's claim under 42 U.S.C. § 1983.

Northern Telecom sought judicial review of the Davidson County Chancery Court's opinion with the Tennessee Supreme Court. On December 4, 1989, the Tennessee Supreme Court filed its Opinion which essentially adopted the reasoning of the Chancery Court.

REASONS FOR GRANTING THE PETITION

DUE PROCESS REQUIRES THAT THE STATE'S JUDICIARY REVIEW THE CONSTRUCTION GIVEN TO A STATE PROCEDURAL TAX STATUTE BY THE STATE'S EXECUTIVE BRANCH IN CASES IN WHICH THE EXECUTIVE BRANCH'S CONSTRUCTION OF THE PROCEDURAL STATUTE HAS DEPRIVED A CITIZEN OF ITS PROPERTY.

The refusal of the Tennessee courts to consider Northern Telecom's claim against the Respondents deprives Northern Telecom of its rights under the due process clause of the United States Constitution, U.S. CONST., AMEND, XIV, § 1. That clause provides, in pertinent part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." The refusal of a court to construe a statute which the legislature has passed and the executive branch has interpreted effectively leaves those two branches with unbridled

discretion in the area at issue. Surely, such discretion does not comport with due process.⁴

This Court has long held that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Access to the judicial system is a basic element of this opportunity:

It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system.

Boddie v. Connecticut, 401 U.S. 371, 375 (1971); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their

⁴ Northern Telecom recognizes that this Court has, at least by implication, approved state tax schemes, like Tennessee's, in which a taxpayer choosing an administrative remedy cannot judicially challenge the tax authority's *substantive* decision on the merits of the taxpayer's claim. See, *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). However, in this case, the tax authority has not made a substantive decision, but rather has interpreted a procedural statute in a manner that prevents the tax authority from addressing the substantive issue. In this appeal, Northern Telecom merely asserts its right to have the *procedural* statute judicially construed. The Commissioner can then proceed to make whatever substantive decision he deems appropriate on the merits of the refund claim.

property or as plaintiffs attempting to redress grievances.""); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner.") Northern Telecom has been wrongfully denied such access.

In a case strikingly similar to the present, this Court has held that when a state judiciary's actions irrationally and unfairly deprive a person of a meaningful hearing, the state courts violate the fourteenth amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff*, the plaintiff company sued the county tax assessor on the ground that the assessor had discriminatorily assessed a tax on the stock of the company. The trial court dismissed the action but issued no opinion or findings of fact. The state's supreme court affirmed. It held that the plaintiff should have administratively challenged the assessor's actions, but, in fact, no administrative remedy was available.

This Court, in a unanimous opinion, held that the state courts had violated the company's rights to due process of law:

It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense.

* * *

If the allegations of the complaint could be established, the Federal Constitution conferred upon the plaintiff the right to have the assessments abated by 25 per cent. In order to protect

its property from being seized in payment of the part of the tax alleged to be unlawful, the plaintiff invoked the appropriate judicial remedy provided by the state.

* * *

If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it.

281 U.S. at 678-679.

The present case is like *Brinkerhoff*. The Tennessee courts dismissed plaintiff's action because it had not paid its taxes under protest and brought suit. However, if plaintiff had paid its 1981 taxes under protest and brought suit, the procedural statute in question, Tenn. Code Ann. § 67-1-1802(a)(6), would never have become an issue because that statute applies *only* to the authority of the Commissioner to issue administrative refunds and has no relevance to refunds ordered by courts. If the Respondents' position is upheld, then those taxpayers who choose to pursue the administrative remedy are prohibited from ever seeking a judicial review of the Commissioner's interpretation of this state procedural statute. In fact, it is apparently the Respondents' position that the Commissioner's interpretation of Tenn. Code Ann. § 67-1-1802(a)(6) can never be judicially reviewed. Due process simply does not allow this result.

As stated above, Tennessee law provides a taxpayer with two separate and distinct remedies for resolving its dispute with the taxing authorities: (i) it can pay the disputed taxes under protest and bring a suit for refund within six months of such payment pursuant to Tenn. Code Ann. §§ 67-1-901, *et seq.*, OR (ii) it can file an administrative claim for refund with respect to the disputed taxes with the Department of Revenue pursuant to Tenn. Code Ann. § 67-1-1802(a)(6). It is undisputed that Northern Telecom filed a timely claim for refund and that the Commissioner's sole basis for denying Northern Telecom's claim for refund was that Tenn. Code Ann. § 67-1-1802(a)(6) precluded the Commissioner from considering Northern Telecom's claim for refund on the merits. Northern Telecom believes that the Commissioner's interpretation is incorrect and has alleged that if this procedural statute is construed properly, then the Commissioner would approve Northern Telecom's claim for refund for 1981 taxes on its substantive merits. The sole issue that Northern Telecom asked the Tennessee courts to resolve, therefore, was whether the Commissioner was correct in his interpretation of the scope of his authority to grant refunds under Tenn. Code Ann. § 67-1-1802(a)(6).

By refusing to resolve this issue, the Tennessee courts have deprived Northern Telecom of any opportunity to have a judicial interpretation as to the correct meaning of Tenn. Code Ann. § 67-1-1802(a)(6). As a result, the Tennessee legislature has passed a procedural statute (Tenn. Code Ann. § 67-1-1802(a)(6)) upon which the Respondents have relied to deny Northern Telecom a proper tax refund, yet there is no judicial forum available to Northern Telecom to determine the correct interpretation of the

procedural statute in question. In these circumstances, Northern Telecom respectfully submits that it has been deprived of its property without due process of law.

While admittedly the Tennessee Supreme Court has held that the only way for a taxpayer to contest the legality of the imposition of a tax is to pay the tax under protest and bring a suit within six months thereafter to recover the taxes, *see Volunteer Structures, Inc. v. Olsen*, 640 S.W.2d 221 (Tenn. 1982); *Seagle-Paddock Pools of Memphis, Inc. v. Benson*, 503 S.W.2d 93 (Tenn. 1973); *American Can Co. v. McCanless*, 103 Tenn. 491, 193 S.W.2d 86 (1946), in each of these cases, the taxpayer had attempted to question the Commissioner's decision on the *substantive tax law* in question. Northern Telecom, however, is not asking the Tennessee courts to resolve matters of substantive tax law. Rather, Northern Telecom is merely asking the Tennessee courts to construe Tenn. Code Ann. § 67-1-1802(a)(6) in a manner that makes it clear that the Commissioner does indeed have the authority and duty to consider Northern Telecom's refund claim on its substantive merits. Therefore, none of the decisions cited above is controlling with respect to the procedural issue concerning the limits on the Commissioner's refund authority which is raised by Northern Telecom's lawsuit.

Respondents will also argue, and the Tennessee courts have agreed, that Tennessee's sovereign immunity doctrine, as codified in Tenn. Code Ann. § 20-13-102, precludes a suit pursuant to 42 U.S.C. § 1983. What the Tennessee courts and Respondents apparently have failed to recognize, however, is that Northern Telecom is not attempting to invoke jurisdiction under § 1983 to resolve substantive tax issues nor to reach the funds of the State.

Rather, the sole issue before the courts is whether the state tax officials have correctly interpreted a procedural statute dealing with the scope of the Commissioner's authority to make tax refunds. Although Northern Telecom has alleged that it expects its refund claim to be approved by the Commissioner once the claim is considered on its merits, Northern Telecom recognizes that under present Tennessee law a determination by the Commissioner on the merits of a refund claim is final and is not subject to judicial review. Accordingly, § 1983 is not being invoked by Northern Telecom in this action to reach the funds of the State, and the doctrine of sovereign immunity does not bar Northern Telecom's action. Instead, Northern Telecom has relied upon § 1983 to support its claim that it has been denied due process of law by the refusal of the Tennessee courts to review the Commissioner's unilateral interpretation of Tenn. Code Ann. § 67-1-1802(a)(6). This is a proper use of § 1983, and the Tennessee Supreme Court has acknowledged that the courts of Tennessee have jurisdiction to hear § 1983 cases. See *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986).

CONCLUSION

The guarantee of due process requires that the Commissioner's interpretation of Tenn. Code Ann. § 67-1-1802(a)(6) be subject to judicial review. For the foregoing reasons, the petition for writ of certiorari to review the decision of the Tennessee Supreme Court should be granted.

Dated: March 2, 1990.

Respectfully submitted,

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APPENDIX A

STATEMENT PURSUANT TO RULE 29.1

NORTHERN TELECOM LIMITED – NORTHERN TELECOM LIMITEE (Parent Company)

Subsidiary Companies of Northern Telecom Limited – Northern Telecom Limitee

1. A W A – NORTEL PTY. LIMITED
2. BCE VENTURES CORPORATION

Subsidiary Company of BCE Ventures Corporation
a. BCE VENTURE CAPITAL INC.

3. BELL-NORTHERN RESEARCH LTD. – RECHERCHES BELL-NORTHERN LTEE
4. BN INSURANCE LTD.
5. BROCK TELECOM LIMITED
6. COOK ELECTRIC TELECOMUNICACOES S/A
7. DATA 100 Pty. Limited

Subsidiary Company of DATA 100 Pty. Limited
a. DATA 100 (Western Pacific) Pty. Limited

8. JNIC LIMITED
9. NEDCO LTD. – NEDCO LTEE
10. NEDCO (1975) LTD. – NEDCO (175) LTEE
11. NETAS – NORTHERN ELECTRIC TELEKOMUNIKASYON A.S.
12. NORTHERN TELECOM (ASIA) LIMITED

Subsidiary Company of Northern Telecom (Asia) Limited

- a. NORTHERN TELECOM CANADA LIMITEE
TELKO, S.A.

13. NORTHERN TELECOM ELECTRONICS LIMITED – NORTHERN TELECOM ELECTRONIQUE LIMITEE

14. NORTHERN TELECOM EUROPE B.V.

Subsidiary Companies of Northern Telecom Europe B.V.

- a. NORTHERN TELECOM AG
- b. NORTHERN TELECOM B.V.
- c. NORTHERN TELECOM N.V.
- d. NORTHERN TELECOM GmbH
- e. NORTHERN TELECOM (IRELAND) LIMITED

Subsidiary Company of Northern Telecom (Ireland) Limited

A. NORTHERN TELECOM (DUBLIN) LIMITED

- f. NORTHERN TELECOM ITALIA S.p.A.
- g. NTA, S.A.
- h. NT COMMUNICATIONS AG

15. NORTHERN TELECOM EUROPE LIMITED

Subsidiary Companies of Northern Telecom Europe Limited

- a. BNR LIMITED
- b. NORTHERN TELECOM DATA SYSTEMS LIMITED
- c. NORTHERN TELECOM (U.K.) LIMITED

16. NORTHERN TELECOM INC.

Subsidiary Companies of Northern Telecom Inc.

- a. BNR INC.
- b. NORTHERN TELECOM (CALA) CORPORATION
- c. NORTHERN TELECOM FINANCE CORPORATION COMMUNICATIONS FUNDING CORPORATION
- d. NORTHERN TELECOM INTERNATIONAL INC.
- e. NORTHERN TELECOM INTERNATIONAL SALES CORPORATION
- f. NORTHERN TELECOM JAPAN INC.
- g. NORTHERN TELECOM MERIDIAN SYSTEMS INC.
- h. NORTHERN TELECOM TRADING CORPORATION
- i. NORTHERN TELECOM VENTURE INC.
- j. SUMISHO ELECTRONICS CO. LTD.

17. NORTHERN TELECOM INDUSTRIES SDN. BHD.

Subsidiary Companies of Northern Telecom Industries Sdn. Bhd.

- a. NORTHERN TELECOM COMPONENTS SDN. BHD.
- b. NORTHERN TELECOM (MALAYSIA) SENDIRIAN BERHAD

- c. NORTHERN TELECOM (PENANG) SDN.
BHD.
- 18. NORTHERN TELECOM INTERNATIONAL FI-
NANCE B.V.
- 19. NORTHERN TELECOM INTERNATIONAL
LIMITED

Subsidiary Company of Northern Telecom Interna-
tional Limited

- a. NORTHERN TELECOM INTERNATIONAL
LIMITEE
 - 20. NORTHERN TELECOM (NEW ZEALAND)
LIMITED
 - 21. NORTHERN TELECOM PACIFIC LIMITED
 - 22. NORTHERN TELECOM WORLD TRADE COR-
PORATION
 - 23. NT IMMOBILIER S.A.
 - 24. NT MERIDIAN S.A.
 - 25. STC PLC
 - 26. TONG GUANG - NORTEL LIMITED LIABILITY
COMPANY
 - 27. 169317 CANADA INC.
-

APPENDIX B
IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

NORTHERN TELECOM, INC.,)	
)	
Appellant,)	(For
)	Publication)
vs.)	Filed
)	December 4, 1989
DUDLEY W. TAYLOR,)	
Commissioner of Revenue, State)	No. 89-21-I
of Tennessee, and W. J.)	Davidson County
MICHAEL CODY, Attorney)	Hon. Irvin H.
General and Reporter,)	Kilcrease,
State of Tennessee,)	Chancellor
)	
Appellees.)	
)	

For the Appellant:

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For the Appellee:

Charles W. Burson
Attorney General
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Assistant Attorney General

OPINION

AFFIRMED

CANTRELL, S.J.

This is an action by a taxpayer against the State Commissioner of Revenue and the Attorney General. The taxpayer seeks a declaratory judgment that the commissioner was authorized to refund the taxes in question or, in the alternative, that the commissioner's refusal to consider the refund deprives the plaintiff of its rights under 42 U.S.C. § 1983.

The chancellor granted the state's motion to dismiss on the grounds that the court lacked subject matter jurisdiction over the declaratory judgment action and that the § 1983 claim was barred by the doctrine of sovereign immunity.

In its complaint, the plaintiff alleged that while it was in the process of preparing its state tax return for the tax year ending December 31, 1981, the commissioner notified the plaintiff that the plaintiff had erred in its treatment of certain interest income for the years 1978 through 1980. As a result, the commissioner contended that the plaintiff owed additional taxes for those years. When the plaintiff filed its 1981 return on October 1, 1982, it calculated the tax due according to the position taken by the commissioner and voluntarily paid the tax.

In 1983, the commissioner assessed the plaintiff with additional taxes for the years 1978 and 1980 because of the alleged erroneous treatment of the interest income. When the plaintiff reviewed the assessment and the applicable law, it concluded that the commissioner's position was incorrect. Accordingly, the plaintiff paid the assessment under protest and filed an action to recover the overpayment.

While the action to recover the overpayment was pending, this court decided the case of *Holiday Inns, Inc. v. Olson*, 692 S.W.2d 850 (Tenn. 1985), which involved the same legal issue that the commissioner had raised with the plaintiff. The *Olson* decision resolved the issue in favor of the taxpayer and against the commissioner. Accordingly, the commissioner agreed to refund the taxes paid under protest for the years 1978 and 1980 which

were the subject of an action for a refund. He refused, however, to honor the plaintiff's claim for a refund for the overpayment of the 1981 taxes. The commissioner's position was that he was allowed by Tenn. Code Ann. § 67-1-1802(a)(6)(1988) to grant a refund after an adverse court decision affecting the taxes only to parties to the action or a party to a similar action. Since the plaintiff in this case was not a party to an action contesting the overpayment for 1981, the commissioner's position would not allow the refund even though the plaintiff was a party to an action involving the same legal issue covering for prior years.

Tenn. Code Ann. § 67-1802(a)(6) provides:

A refund which is authorized solely by a final court adjudication shall not be made to any person who is not either a party to such action or a party to another similar action.

The plaintiff filed this action on June 20, 1988, asking that the chancellor decree that Tenn. Code Ann. § 67-1-1802(a)(6) authorizes and directs the commissioner to grant the refund in this case. The plaintiff's position is that a refund is allowed if the taxpayer is a party to an action involving the same legal issue, regardless of whether such action pertains to the tax period for which the refund is being sought.

It is true that the law in this state now allows the Commissioner of Revenue to issue tax refunds. Tenn. Code Ann. § 67-1-1802(a)(1)(1988) provides:

The commissioner of revenue, with the approval of the attorney general . . . is empowered and directed to refund to taxpayers all taxes . . . that are, on the date of payment, paid in error or

paid against any statute, rule, regulation or clause of the constitution of this state or the United States.

The commissioner's authority, however, is limited in cases where the refund claim results from an adverse decision in a lawsuit brought by other taxpayers. See Tenn. Code Ann. § 67-1802(a)(6), *supra*.

Since the plaintiff was a party to another action involving the question decided in *Holiday Inns, Inc. v. Olson*, (although not concerning the 1981 taxes), the plaintiff maintains that the court should issue a declaratory judgment that the commissioners could issue the refund for the 1981 taxes. Recognizing the pitfalls that one encounters in an action asking the court to order the refund directly, the plaintiff has studiously avoided a request that the court issue an order mandatory in tone or effect.

The lower court dismissed the decaratory [sic] judgment action because the court lacked subject matter jurisdiction.

A.

The Declaratory Judgment

In 1923, the legislature passed the Tennessee Declaratory Judgments Act, now codified at Tenn. Code Ann. § 29-14-101, et seq. Under that act, the courts of record were given the power, within their respective jurisdictions, to declare rights, status, and other legal relations, Tenn. Code Ann. § 29-14-102(1980), and to construe or determine the validity of any written instrument, statute, ordinance, contract, or franchise. Tenn. Code Ann. § 29-14-103(1980).

The key to the jurisdictional question in this case is found in the words of the act itself. Courts of record are given the power to render declaratory judgments *within their respective jurisdictions*. Tenn. Code Ann. § 29-14-103. In another section of the code, the legislature has restricted the power of the courts to entertain suits against the state "or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property." Tenn. Code Ann. § 20-13-102(1980). In *Hill v. Beeler*, 199 Tenn. 325, 286 S.W.2d 868 (1956), this Court held that § 20-13-102 prohibited the courts from entertaining an action for a declaratory judgment against a state officer. The Court said:

The Declaratory Judgment Act [§ 29-14-101], et seq., does not permit the filing of a suit against the State to construe statutes so it seems to us that there is no authority for the suit but that Code Section [20-13-102] expressly forbids such an action. *Id.* at 286 S.W.2d 871.

To the same effect is the decision in *American Can Co. v. McCanless*, 183 Tenn. 491, 193 S.W.2d 86 (1946), an action for a declaratory judgment in a tax case, where this Court held that the declaratory judgment act did not apply to the state because the state was not specifically mentioned in the act.

The plaintiff seeks to distinguish *American Can* on the ground that it involved questions of substantive law and was an attempt to hinder or delay the collection of the tax. This case is different, the plaintiff asserts, because all that is involved is the question of procedure and the taxes have already been paid.

We fail to see the distinction, however. Both cases involve actions for a declaratory judgment against the Commissioner of Revenue. A threshold issue is the jurisdiction of the court to entertain the action regardless of the questions involved. We think the legislature had unmistakably spoken on that point contrary to the position of the plaintiff.

B.

The 42 U.S.C. § 1983 Claim

The plaintiff asserts that if this Court decides there is no subject matter jurisdiction under the declaratory judgments act, then jurisdiction exists under 42 U.S.C. § 1983. That section, part of the Civil Rights Act of 1871, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen, of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The plaintiff contends that the commissioner and the attorney general have deprived it of a proper tax refund because of the way they have construed Tenn. Code Ann. § 67-1-1802(a)(6). The plaintiff further contends that § 1983 is invoked because the legislature has passed a statute which affects the property rights of its residents but has provided no means for a judicial review of the statute.

We are of the opinion that the plaintiff's complaint fails to state a claim on which relief can be granted and was properly dismissed by the chancellor. *See* Tenn. R. Civ. P. 12.02(6).

First, the plaintiff has not pled facts showing that it has been deprived of any right, privilege, or immunity. We note that prior to January 1, 1986, the procedure for the recovery of taxes was governed by the provisions of Tenn. Code Ann. § 67-1-901, et seq. That procedure required the taxpayer to pay the tax under protest and sue the collecting officer for a refund. Tenn. Code Ann. § 67-1-903 (1988). The plaintiff did not take advantage of that procedure; instead it voluntarily paid the tax. As the law then stood, the right to recover the taxes paid was gone forever. *See Blank v. Olsen*, 662 S.W.2d 324 (Tenn. 1983). We fail to see how the actions of the commissioner and the attorney general could have deprived the plaintiff of a right that was already gone.

If, in the second place, the complaint is that the legislature has deprived the plaintiff of a way to obtain judicial review of Tenn. Code Ann. § 67-1-1802(a)(6), we are of the opinion that 42 U.S.C. § 1983 does not provide any relief. The allegation concerning the acts of the legislature clearly involves the action of the state itself, and the state is not a "person" within the meaning of 42 U.S.C. § 1983. *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967). (*See also American Civil Liberties Union of Tennessee v. State of Tennessee*, 496 F.Supp. 218 (M.D. Tenn. 1980), with respect to the question of the state's immunity when only prospective relief is sought.)

The judgment of the court below is affirmed. Tax the costs on appeal to the appellant.

/s/ Ben H. Cantrell
BEN H. CANTRELL,
SPECIAL JUDGE

CONCUR:

DROWOTA, C.J.

FONES, HARBISON, O'BRIEN, JJ.

APPENDIX C

IN THE CHANCERY COURT FOR THE STATE
OF TENNESSEE 20TH JUDICIAL DISTRICT,
DAVIDSON COUNTY, PART ONE

NORTHERN TELECOM, INC.)	
VS.)	
DUDLEY W. TAYLOR,)	No. 88-1590-I
Commissioner of Revenue,)	
State of Tennessee)	
ET AL.)	

MEMORANDUM AND ORDER
(Filed Feb. 10, 1989)

This case is before the Court on defendants' motion to dismiss. Plaintiff has filed suit seeking a declaratory judgment which decrees that T.C.A. §§ 67-1-1802(a)(1) and (5) authorize the refund of certain taxes paid by plaintiff. Plaintiff has also claimed that the defendants' refusal to issue a refund deprives plaintiff of property in violation of 42 U.S.C. § 1983.

Plaintiff is a Delaware corporation with its principal office in Nashville, Tennessee. Plaintiff is engaged in the business of the manufacture and sale of communications equipment and technology. The relevant time period for the payment of franchise and excise taxes is 1981, for which plaintiff filed a tax return on October 1, 1982. During the time that plaintiff was preparing this return an audit was being performed on plaintiff's tax returns for the years 1978-1980. After the conclusion of the audit, defendant advised plaintiff that certain taxes for non-business income were still owing for the audited period. The defendant had determined that interest income from

short-term investment of excess working capital and loans made by plaintiff to its subsidiary corporations were non-business income subject to excise tax pursuant to T.C.A. § 67-4-810(d). Plaintiff had classified this income as business income and had apportioned it among several states pursuant to T.C.A. § 67-4-811. Given this determination by defendant, plaintiff modified their 1981 tax return to reflect the state's position on the taxable status of this income.

On March 24, 1983, plaintiff received a letter from defendant assessing it excise tax for 1978-1980. Plaintiff paid the tax under protest and on May 10, 1984, filed suit for recovery of the taxes pursuant to T.C.A. § 67-1-901. Plaintiff also filed a claim for a refund for the tax years ending December 31, 1981. On June 24, 1985, the Tennessee Supreme Court issued a decision in favor of plaintiff's position on the taxable status of the income in question. See *Holiday Inns, Inc. v. Olsen*, 692 S.W.2d 850 (Tenn. 1985). On June 16, 1987, defendant refunded the back taxes paid under protest by plaintiff for the years 1978-1980. On December 21, 1987, defendant denied plaintiff's claim for a refund of the 1981 taxes paid pursuant to the Commissioner's earlier decision regarding the classification of "business income."

Plaintiff contends that this Court has jurisdiction over this matter pursuant to the Declaratory Judgments Act, T.C.A. § 29-14-102. Plaintiff claims to have presented a justiciable controversy as required under the Act. With respect to plaintiff's alternative claim under 42 U.S.C. § 1983, plaintiff claims that the Court has subject matter jurisdiction under T.C.A. § 29-14-101, *et seq.*, to review this claim.

Conversely, defendants contend that the Court lacks subject matter jurisdiction as plaintiff failed to satisfy the requirements of T.C.A. § 67-1-901. Plaintiff did not pay the 1981 "non-business income" tax under protest, and it did not file a claim for a refund within six months. Further, plaintiff's recovery under 42 U.S.C. § 1983 claim is barred by the doctrine of sovereign immunity.

The Court concludes that defendants' motion to dismiss should be granted. Plaintiff did not pay the 1981 tax in question under protest nor did plaintiff file a claim within the six month statute of limitation as required under T.C.A. § 67-1-901. Therefore, the Court does not have subject matter jurisdiction over this matter. Finally, plaintiff's claim under 42 U.S.C. § 1983 cannot be maintained under the doctrine of sovereign immunity. Defendants Taylor and Cody are immune from liability under § 1983 as they acted on behalf of the State, in their official capacity.

Therefore, it is ordered that defendants' motion be granted. Costs are taxed to the plaintiff.

/s/ Irvin H. Kilcrease Jr.
IRVIN H. KILCREASE, JR.
CHANCELLOR

February, 9th, 1989

cc: Jim G. Creecy
Michael D. Sontag

APPENDIX D

42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Tenn. Code Ann. § 20-13-102 provides:

(a) No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

(b) No statutory or other provision authorizing the University of Tennessee and its board of trustees to sue and be sued shall constitute a waiver of sovereign immunity.

Tenn. Code Ann. § 67-1-1802(a)(6) provides:

A refund which is authorized solely by a final court adjudication shall not be made to any person who is not either a party to such action or a party to another similar action.



MAY 8 1989

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

NORTHERN TELECOM, INC.,

Petitioner,

vs.

DUDLEY W. TAYLOR, COMMISSIONER
OF REVENUE, STATE OF TENNESSEE
and W. J. MICHAEL CODY,
ATTORNEY GENERAL AND REPORTER,
STATE OF TENNESSEE,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court
Of Tennessee

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES W. BURSON
Attorney General & Reporter

JOHN KNOX WALKUP
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QUESTION PRESENTED

Whether a taxpayer was afforded due process when the Tennessee courts dismissed the taxpayer's action seeking a refund of its 1981 tax payments on the basis that (1) the taxpayer could not sue the state under 42 U.S.C. § 1983 for a retroactive monetary award from the state treasury and (2) the taxpayer had failed to follow the procedures available under state law for recovery of taxes.

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No. 89-1450

In The
Supreme Court of the United States
October Term, 1989

NORTHERN TELECOM, INC.,

Petitioner,

vs.

DUDLEY W. TAYLOR, COMMISSIONER
OF REVENUE, STATE OF TENNESSEE
and W. J. MICHAEL CODY,
ATTORNEY GENERAL AND REPORTER,
STATE OF TENNESSEE,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court
Of Tennessee

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Dudley W. Taylor, Commissioner of Revenue, State of Tennessee and W. J. Michael Cody, Attorney General and Reporter, State of Tennessee, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Tennessee Supreme Court dated, December 4, 1989. That opinion is reported at 781 S.W.2d 837 (Tenn. 1989)

STATEMENT OF THE CASE

Northern Telecom brought this suit under the Tennessee Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101 *et seq.* and 42 U.S.C. § 1983 seeking a declaratory judgment and refund of a portion of its 1981 taxes. Northern Telecom alleged that Dudley W. Taylor, the Commissioner of Revenue of the State of Tennessee (Commissioner), had misconstrued Tenn Code Ann. § 67-1-1802(a)(5) when the Commissioner denied a refund request filed by Northern Telecom for refund of a portion of its 1981 excise taxes which were voluntarily paid.¹ Under Tennessee law in effect at the time of the payment of these taxes, taxpayers were permitted to bring suit for recovery of taxes provided that the taxes were paid under protest and suit for recovery was filed within 6 months from the date of payment. See Tenn. Code Ann. § 67-1-901 *et seq.* If taxes were voluntarily paid, a taxpayer could not bring suit for recovery of those taxes. *Blank v. Olsen*, 662 S.W.2d 324 (Tenn. 1983). In addition, Tenn. Code Ann.

¹ The Complaint cites Tenn. Code Ann. § 67-1-1802(a)(5), however, Tenn. Code Ann. § 67-1-707(a)(3) is the provision which would be applicable to the 1981 tax payments. Tenn. Code Ann. § 67-1-707(a)(3) was included in the refund statute as revised in 1986 at Tenn. Code Ann. § 67-1-1802(a)(5). In 1988, this provision was recodified at Tenn. Code Ann. § 67-1-1802(a)(6). Tenn. Code Ann. § 67-1-707(a)(3) provided:

A refund which is authorized solely by a final court adjudication shall not be made to any person who is not either a party to such action or a party to a similar action brought pursuant to part 9 of this chapter.

Part 9 refers to Tenn. Code Ann. § 67-1-901 *et seq.*

§ 67-1-707 provided for an administrative refund of taxes which had been paid voluntarily.² Under this provision, taxpayers filed with the Commissioner of Revenue requests for refunds of taxes which were claimed to have been paid in error. The Commissioner of Revenue was authorized subject to approval by the Attorney General to grant refunds which in his determination were paid in error. The decisions of the Commissioner and Attorney General were final and not subject to review. The Commissioner's authority to grant refunds was limited by Tenn. Code Ann. § 67-1-707(a)(3) with the effect that the Commissioner could not grant retroactive refunds based solely on a court decision unless the taxes had been paid under protest and suit filed pursuant to Tenn. Code Ann. § 67-1-901 *et seq.* Taxpayers were not permitted to bring suit against the state under Tenn. Code Ann. § 67-1-707 for refund of taxes.

The Complaint alleged that the Commissioner of Revenue had denied the request for refund on the basis that Tenn Code Ann. § 67-1-1802(a)(5) denied the Commissioner authority to make a refund for Petitioner's 1981 tax payments, since Northern Telecom was not a party to an action contesting its 1981 taxes. The Commissioner acted upon the advice of the Attorney General.

² Tenn. Code Ann. § 67-1-1807 provides that the controlling provision with respect to claims for refund of taxes paid prior to January 1, 1986 is Tenn. Code Ann. § 67-1-707 (1985). The language in Tenn. Code Ann. § 67-1-707 was carried into the subsequent refund statute enacted in 1986 and codified at Tenn. Code Ann. § 67-1-1802.

Northern Telecom alleged that the Commissioner's denial of the refund was contrary to Tenn Code Ann. § 67-1-1802(a)(5) and that the refund for the 1981 taxes should be granted because the 1981 tax payment in question involved the same legal issue litigated in *Holiday Inns v. Olsen*, 692 S.W.2d 850 (Tenn. 1985) and in another suit filed by Northern Telecom seeking recovery of its excise tax payments for the years 1978 to 1980. The suit involving 1978 to 1980 taxes was properly filed under T.C.A. § 67-1-901 *et seq.* In accordance with the decision in *Holiday Inns*, the Petitioner successfully recovered a portion of its excise taxes paid under protest for the years 1978 to 1980. Thus, the Petitioner asserted that it was entitled to recover its 1981 tax payments.

The trial court dismissed the present case on Respondent's motion to dismiss on the grounds that the court lacked subject matter jurisdiction since Northern Telecom had not satisfied the jurisdictional requirements of Tenn. Code Ann. § 67-1-901 *et seq.* for tax recovery suits and that the § 1983 claim was barred by the doctrine of sovereign immunity.

The Tennessee Supreme Court affirmed in an opinion published at 781 S.W.2d 837 (Tenn. 1989). The Tennessee Supreme Court followed its earlier decision in *American Can Company v. McCanless*, 163 Tenn. 491, 193 S.W.2d 86 (1946), and held that because of a lack of jurisdiction this action could not be maintained under the Tennessee Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101 *et seq.* With respect to the § 1983 claim, the Court concluded that the state is not a "person" within the meaning of 42 U.S.C. § 1983, that the Complaint failed to state a claim

for relief under § 1983 and that the state had not waived its sovereign immunity.

Accordingly, the Tennessee Supreme Court concluded that the Complaint had been properly dismissed and affirmed the decision below.

REASONS FOR DENYING THE WRIT

Since the decision of the Tennessee Supreme Court is correct and conflicts with no decision of this Court, further review by this Court is not warranted.

In spite of Petitioner's assertions to the contrary, the Complaint seeks a Declaratory Judgment and refund of a portion of the Petitioner's 1981 taxes in question. (See the Complaint in Appendix hereto at pages App. 5-6.) The Petitioner conceded below that the Respondents were sued in their official capacities only. Petitioner's suit filed under 42 U.S.C. § 1983 is based on an alleged breach of state law occurring in the past and the Petitioner requests a retroactive award which requires payment of funds from the state treasury.

The State of Tennessee is the real party in interest since the Petitioner is seeking a retroactive award that would refund its 1981 taxes. The general rule is that relief sought nominally against an officer of the state is in fact against the sovereign if the decree would operate against the state. *Hawaii v. Gordon*, 373 U.S. 57 (1963). The Tennessee Supreme Court properly found that neither the state nor its officials acting in their official capacities are "persons" within the meaning of 42 U.S.C. § 1983. *Will v.*

Michigan Department of State Police, 491 U.S. (1989). Thus, the Tennessee Supreme Court correctly found that this action could not be maintained under § 1983. Further, under Article 1, Section 17 of the Tennessee Constitution and Tenn. Code Ann. § 20-13-102, the State of Tennessee is immune from a suit in state court seeking a retroactive award of funds from the state treasury except under procedures specifically authorized by state law.³

In addition, the Tennessee Supreme Court correctly found that the Complaint failed to state a claim upon which relief could be granted. The Petitioner claims that the rulings of the Tennessee courts have resulted in a taking of Petitioner's property without due process. To the contrary, the Tennessee Supreme Court concluded that any right of judicial review of the 1981 tax liability had been relinquished by the Petitioner upon the voluntary payment of those taxes. *Blank v. Olsen*, 662 S.W.2d 324 (Tenn. 1983). Under Tenn. Code Ann. § 67-1-901 *et seq.* the Petitioner had the opportunity to pay its taxes under protest and bring suit to challenge that liability. Under the Due Process Clause, a tax collection system satisfies the due process requirements of the United States Constitution so long as at some stage in the proceedings, the taxpayer is given an opportunity to test the validity of its tax liability. *Hodge v. Mascatine County*, 196 U.S. 276, 281 (1905).

The Petitioner had a judicial remedy available with respect to its 1981 tax payments, but failed to exercise

³ Compare *Edelman v. Jordan*, 415 U.S. 651 (1974) where Eleventh Amendment immunity prohibited such a suit in federal court.

that remedy. In *Bonin v. Gannon*, 494 F. Supp. 78, 81 (M.D. Pa. 1980) it was held that a taxpayer's failure to use a statutory method for challenging allegedly improper assessments in a timely manner barred any possible § 1983 claim. A plain, speedy and efficient remedy for tax recovery such as payment of the tax and suit for refund is not rendered insufficient because a taxpayer has failed to use said remedy. *Aluminum Company of America v. Department of Treasury*, 522 F.2d 1120 (6th Cir. 1975). Tax recovery procedures whereby a taxpayer pays taxes under protest and then brings suit have been found to be adequate remedies in § 1983 actions. *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), reh. den, 451 U.S. 1011 (1981). Tennessee's tax collection system provided the Petitioner an adequate remedy and satisfies the requirements of the Due Process Clause by providing taxpayers with an opportunity to contest their tax liability by payment under protest and suit for recovery.

The Tennessee Supreme Court has not denied to the Petitioner the use of any established adjudicatory procedures. It is settled law that the decisions of the Commissioner of Revenue and the Attorney General on administrative refunds under Tenn. Code Ann. § 67-1-707 are final and not subject to review. *Seagle-Paddock Pools of Memphis, Inc. v. Benson*, 503 S.W.2d 93 (Tenn. 1973); *Volunteer Structures, Inc. v. Olsen*, 640 S.W.2d 221 (Tenn. 1982). The Tennessee Supreme Court properly concluded that the Plaintiff had failed to exercise its opportunity to challenge its 1981 tax payments in court and had relinquished any property right in the tax payments in question.

The Tennessee Supreme Court's decision is not in conflict with any decision of this Court. The Petitioner claims that the decision of the Tennessee Supreme Court is contrary to the decision in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); however, that case is clearly distinguished from the present case. In *Brinkerhoff*, the state court held that an alleged discriminatory tax assessment was required to be brought before the state tax commission. In so ruling, the state court reversed its prior decision which had not established this requirement. Since the time for application for the administrative relief before the state tax commission had expired by the time that the state supreme court had issued its opinion, the taxpayer was effectively denied an opportunity to challenge the assessment.

The present case is clearly distinguished from *Brinkerhoff*. The Tennessee Supreme Court's decision has not reversed any prior decision regarding procedures for recovery of taxes and has not deprived the Petitioner of access to any established judicial procedures as occurred in *Brinkerhoff*. Further, Justice Brandeis in the Court's opinion in *Brinkerhoff* noted that the Missouri court had not refused to hear the Complaint because of a lack of power or a lack of merit in the Complaint. 281 U.S. at 679. The Tennessee courts, however, have concluded that there was a lack of jurisdiction to maintain the action framed in the Complaint and that the Complaint failed to state a claim upon which relief could be granted. While the taxpayer did not have an opportunity to challenge its tax liability in *Brinkerhoff*, due process has been afforded to the Petitioner under the Tennessee tax collection system

but the Petitioner failed to take advantage of the available remedy.

The Tennessee Supreme Court's decision is in accord with the applicable decisions of this Court and there are no special or important reasons warranting briefs on the merits and oral arguments in this matter.

CONCLUSION

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney General and Reporter

JOHN KNOX WALKUP
Solicitor General

JOE C. PEEL
Assistant Attorney General
450 James Robertson Parkway
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(615) 741-6431

IN THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE

NORTHERN TELECOM INC.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
DUDLEY W. TAYLOR, Commission-)	
er of Revenue, State of Tennessee,)	No. 88-1590-I
and MICHAEL J. CODY,)	
Attorney General and Reporter,)	
State of Tennessee,)	
)	
Defendant.)	

COMPLAINT

1. Plaintiff Northern Telecom Inc. is a Delaware corporation, with its principal office in Nashville, Tennessee.

2. Defendant Dudley W. Taylor is the Commissioner of Revenue for the State of Tennessee and is charged with the responsibility for collecting Tennessee corporate franchise and excise taxes which are imposed by T.C.A. Sections 67-4-801, et seq. Defendant is named in this cause in his official capacity as Commissioner of Revenue in accordance with T.C.A. Sections 67-1-101, et seq.

3. Defendant Michael J. Cody is the Attorney General and Reporter for the State of Tennessee and is named in this cause in his official capacity.

4. Plaintiff's primary business is the manufacture and sale of communications equipment and technology. Plaintiff's commercial domicile is located in Nashville, Tennessee, but Plaintiff does business in many states.

5. Plaintiff timely filed its Tennessee franchise and excise tax return for the year ending December 31, 1981 on October 1, 1982.

6. During the time that Plaintiff was preparing its Tennessee franchise and excise tax return for the year ending December 31, 1981, Defendant Commissioner was in the process of performing an audit of Plaintiff's tax returns for the years 1978 through 1980. During the course of performing this audit and prior to the filing of Plaintiff's 1981 tax return, the Defendant Commissioner notified Plaintiff that certain adjustments should be made to Plaintiff's returns for these earlier years. The proposed adjustments were attributable to Defendant Commissioner's assertion that interest income from (i) the short-term investment of excess working capital and (ii) loans made by Plaintiff-to-its subsidiary corporation for use in their ordinary business operations, should be classified as "non-business" income which must be wholly allocated to Tennessee for excise tax purposes under T.C.A. §67-4-810(d). Plaintiff had treated these income items as "business income" on its tax returns for 1978-1980 and had apportioned the income among all of the states in which Plaintiff was doing business (including Tennessee) in accordance with T.C.A. §67-4-811.

7. Plaintiff relied upon Defendant Commissioner's advice with respect to the proper classification of these items of income as "business income" in preparing its tax return for 1981, which it filed on October 1, 1982.

8. On March 24, 1983, Plaintiff received an assessment letter from Defendant Commissioner stating that additional Tennessee excise tax was payable for Plaintiff's

two tax years ending December 31, 1978 and December 31, 1980.

9. After receiving the assessment and upon further review of the legal issue, Plaintiff determined that it had properly treated these items of income as "business income" on its returns for 1978-1980. Accordingly, Plaintiff paid the assessment under protest and on May 10, 1984 instituted proceedings in the time and manner provided by T.C.A. §67-1-901 *et seq.* for recovery of the taxes (Davidson County Chancery Court, Docket No. 84-1062-III). At this same time, Plaintiff also filed a claim for refund for the tax year ended December 31, 1981.

10. On June 24, 1985 the Tennessee Supreme Court decided the case of *Holiday Inns, Inc. v. Olsen*, 692 S.W.2d 850 (Tenn. 1985), resolving the substantive issues raised by Plaintiff's lawsuit in its favor. Accordingly, Plaintiff and Defendant Commissioner entered into an agreed final order on June 16, 1987, directing a refund to Plaintiff for taxes paid under protest as a result of Defendant Commissioner's assessment for 1978-1980.

11. On December 21, 1987 Defendant Commissioner denied Plaintiff's claim for refund for 1981, stating that:

"[S]ince the refund was requested and the return was filed prior to the date of the [Holiday Inns] decision, June 24, 1985, we cannot approve your Claim for Refund."

12. Tennessee Code Annotated Section 67-1-1802(a)(5) provides as follows:

"A refund which is authorized solely by a final court adjudication shall not be made to any person who is not a party to such action *or a party to another similar action.*" (emphasis added)

13. It is Plaintiff's understanding that Defendant Commissioner admits that Plaintiff would be entitled to a refund for 1981 with respect to the substantive tax law issue involved in the 1981 refund claim. Defendant Commissioner takes the position, however, that T.C.A. §67-1-1802(a)(5) prohibits the granting of a refund since the specific excise taxes for 1981 were not part of any actual court proceeding at the time of the *Holiday Inns* decision.

14. It is Plaintiff's understanding that Defendant Attorney General has advised Defendant Commissioner that T.C.A. § 67-1-1802(a)(5) should be construed in the manner described above to prohibit refund claims authorized by a final court adjudication unless the taxes in question were part of an actual court proceeding at the time of the final court adjudication.

15. Plaintiff respectfully submits that for its tax year 1981 it was a "party to another similar action" within the meaning of statute with respect (sic) the tax years 1978-1980 and, thus, is clearly entitled to the refund for the tax year 1981.

16. Plaintiff respectfully submits that the Defendants' actions in interpreting T.C.A. §67-1-1802(a)(5) in the manner described above have deprived Plaintiff of its property in violation of 42 U.S.C. § 1983 for which there is no adequate remedy for the redress thereof.

PREMISES CONSIDERED, Plaintiff prays as follows:

1. That process issue and be served upon the Defendant.

2. That a declaratory judgment be entered decreeing that T.C.A. § 67-1-1802(a)(1) and (5) authorize and direct the Commissioner of Revenue to refund all taxes as to which all of the following criteria are met:

- (a) the taxpayer has, within the period of limitation described in T.C.A. §67-1-1802(a)(1), filed a claim for refund pertaining to the taxes in question;
- (b) the refund is authorized by a final court adjudication; and
- (c) the taxpayer is either a party to such action or a party to another similar action (regardless of whether such action pertains to the tax period for which the refund is being sought).

3. That Plaintiff have and recover of Defendant Commissioner those additional excise taxes (and the interest associated therewith) assessed by the Defendant Commissioner as a result of its audit, together with interest at the statutory rate from the date of forty-five (45) days after the date on which Plaintiff filed its claims for refund.

4. That Plaintiff have and recover of the Defendant Commissioner all of the costs of this cause together with Plaintiff's reasonable attorney's fees and expenses of litigation incurred herein pursuant to T.C.A. Section 67-1-1803(d).

5. That, in the alternative, the Court finds that the Defendants have deprived Plaintiff of its rights in violation of 42 U.S.C. § 1983 and are liable to Plaintiff for the

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refund of the taxes, penalty and interest authorized by the decision in *Holiday Inns. Inc. v. Olsen, Supra.*

6. That Plaintiff have such other and further relief to which it may be entitled.

Respectfully submitted,

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